Is there any inherent difference between the two questions, what is public policy, and, what is sufficient evidence to go to the jury? One seems just as much a fact as the other, and both, to be sure, require the exercise of sound reasoning power, backed by long experience, for their proper solution. That is why they have both been left to the judge. We arrive, then, at this paradox, that the only essential difference between law and other facts is that human experience has shown it to be necessary that the former should be dealt with by a man of special training—the judge. This is well brought out in Professor Thayer's Preliminary Treatise on Evidence, where, after stating that, philosophically speaking, all law is fact, he concludes his discussion of Law and Fact in Jury Trials as follows:

"It seems plain that the doctrine of our common law system which allots to the jury the decision of disputed questions of ultimate fact, is to be taken with the gravest qualifications. Much fact which is part of the issue is for the judge; much which is for the jury is likely to be absorbed by the judge, 'whenever a rule about it can be laid down'; as regards all of it, the jury's action may be excluded or encroached upon by the co-operation of the judge with one or both of the parties; and, as regards all, the jury is subject to the supervision of the judge, in order to keep it within the limits of law and reason."

The conclusion seems inevitable, that when a jury has rendered a verdict upon a question which human experience, crystalized in the common law, has marked out as a question for the judge, it has so far exceeded its province, that an arbitrary reversal of its verdict by an Appellate Court cannot by any stretch of the imagination be regarded as an infringement of that province.

FORFEITURE FOR BREACH OF CONDITION IN INSURANCE POLICY.

In the recent case of *Dolliver v. Granite State Insurance Co.*, 89 Atl. 8, Me., it was held: that where the standard policy of insurance in question provided that the policy should be *void* if the premises should become vacant and so remain for more than thirty days, without the previous consent of the insurer in writing, and a breach of this provision took place, followed by a subsequent occupancy, the insured could not recover for a loss occurring after the subsequent occupancy. The court construed

the word "void" to mean null, of no effect, and decided that the force of the provision did not depend upon an increase of the risk but that the vacancy worked a forfeiture and not merely a suspension of the risk so that the subsequent occupancy did not revive the policy.

There is decided conflict in the authorities upon this matter. In the first place it should be noticed that the cases which decide that a breach of the condition will not work a forfeiture, where the policy provides simply for notice to the insurer of any increased risk and giving him the option to declare it void, are clearly distinguishable from the principal case.[1] Again it is evident that cases holding, under the older form of policies, which provide that a breach shall avoid the contract but also specifically state that the policy shall "cease and be of no effect so long as the premises shall be used, etc.," that a breach only suspends the policy during the prohibited user are no authority in opposition to the case under discussion.[2] The contract as a whole shows that the parties only intended a failure to comply with the provision should cause the policy to be suspended so long as the breach continued and no longer.[3] Yet these cases are often baldly cited to the effect that a breach of a provision stipulating that the contract shall be void if not complied with will work only a temporary suspension of risk.[4] We see they stand for no such proposition.

Now as to the principal case it would seem clear at first impression that where the policy provides that upon breach of a condition it shall become void there should be no recovery after such breach though the loss is not due to the breach and occurs after it has been repaired. This is the view of many jurisdictions.[5] The provision is a warranty in the nature of an express

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[1] *Joyce v. Maine Ins. Co.*, 45 Me., 168; *Tiefenthal v. Citizens' Mut. F. Ins. Co.*, 53 Mich., 306; *Arkansas Ins. Co. v. Bostick*, 27 Ark., 539.

[2] *Lounsbury v. Ins. Co.*, 8 Conn., 458; *Phoenix Ins. Co. v. Lawrence*, 4 Metc. (Ky.), 9; *Blood v. Fire Ins. Co.*, 12 Cush., 472; *U. S. F. & M. Ins. Co. v. Kimberly*, 34 Md., 224.

[3] *New England Fire & M. Ins. Co. v. Wetmore*, 32 Ill., 221.

[4] See *Athens Mutual Ins. Co. v. Toney*, 1 Ga. App., 492; *Germania Fire Ins. Co. v. Klewer*, 129 Ill., 599; *Trader's Ins. Co. v. Catlin*, 163 Ill. 256.

[5] *Phoenix Ins. Co. v. Lawrence, supra; Putnam v. Commonwealth Ins. Co.*, 4 Fed., 753; *Leggett v. Aetna Ins. Co.*, 10 Rich. (S. C.), 202; *Wheeler v. Trader's Ins. Co.*, 62 N. H., 450; *German Amer. Ins. Co. v. Humphrey,*

condition precedent and must be fulfilled before liability can attach to the insurer.[6]

Certainly this is so when the provision is against insurance in other companies. As was well said in an Indiana case, "The primary purpose of inserting (such) conditions is to protect the company from the hazard of over insurance. * * * Consequently, it aims to secure the continued vigilance and co-operation of the owner in preserving the property. * * * Whenever the property owner * * * applies for and obtains a second policy, valid upon its face, with intent and purpose to carry the second policy as valid insurance * * * he has therefore defeated the whole policy and purpose of the condition."[7]

Other courts, however, have assumed an opposite view. They construe the word *void* as meaning *voidable* only and hold that when the cause for forfeiture no longer exists the policy is revived.[8]

With this decision we cannot agree. Most of the reasons given therefore seem to be founded upon some idea of doing "natural justice" between the parties.[9] An interpretation is thus given to the contract which is not apparent on its face.

The rule of construction applicable to all contracts is that in the absence of ambiguity there is no room for interpretation of the meaning of words.[10]

It is not within the province of a court to change the terms of a contract, however harsh they may be, if in so doing the meaning

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62 Ark., 348; *German Ins. Co. v. Russell,* 65 Kans., 373; *Chester Co. Mut. F. Ins. Co. v. Coatesville Shoe Factory,* 86 Pa. St., 407; *Georgia Homes Ins. Co. v. Rosenfield,* 95 Fed., 358; *Stuart v. Ins. Co.,* 179 Mass., 434; *Hardiman v. Fire Ass'n.,* 212 Pa., 383; *Jersey City Ins. Co. v. Michol,* 35 N. J. Eq., 291; *Carleton v. Ins. Co.,* 109 Me., 79; *Imperial Fire Ins. Co. v. Coos County,* 151 U. S., 452, 14 Sup. Ct., 379.

[6] *Mead v. Northwestern Ins. Co.,* 7 N. Y., 530.

[7] *Am. Ins. Co. v. Replogle,* 114 Ind., 1.

[8] *Trader's Ins. Co. v. Catlin, supra; Fireman's Ins. Co. v. Cecil,* 12 Ky. Law Rep., 259; *Obermeyer v. Globe Mut. Ins. Co.,* 43 Mo., 573; *German Mut. F. Ins. Co. v. Fox,* 96 N. W., 652; *Born v. Insurance Co.,* 110 Iowa, 379; *Insurance Co. v. Pitts,* 88 Miss., 587; *McGannon v. Ins. Co.,* 171 Mo., 143; *Athens Mut. Ins. Co. v. Toney, supra; Sumter Tobacco Warehouse Co. v. Phoenix Ins. Co., supra.*

[9] See cases cited in note 7, *supra.*

[10] *Hoyt v. Ketcham,* 54 Conn., 60; *Nichols v. Mercer,* 44 Ill., 250; *Noyes v. Nichols,* 28 Vt., 159.

is ignored.[11] Words are to be given their plain meaning unless a contrary intent appears.[12] In these policies we find it difficult to discern any ambiguity. The word *void* does not mean *voidable* in ordinary legal parlance.

The Illinois court has said in substituting such a meaning:[13] "That a recovery on a policy on a building * * * should be defeated because a gallon of gasolene was therein kept and used * * * does not commend itself as a reasonable rule." Where is the limit to be fixed, then? Surely the keeping of 2,000 gallons should preclude recovery, or of 200. Each case cannot be decided upon its individual merits.

In a recent Georgia case the view of these courts was thus expressed:[14] "When words of the policy are that the insurance shall be void if the premises * * * shall be vacant, the meaning is simply that if a loss occurs during the prohibited vacancy the policy is void"; that," it is unjust to hold that a condition that in no wise contributed to the loss should work a forfeiture of the insurance," and that, "the purpose of the clause is to protect the insurer from the risk of non-occupation."

This construction does not appeal to the reason. As we have shown, the purpose of such provisions is not only that stated by this court, but also to ensure care on the part of the insured. But apart from the practical side of the matter, the parties have a right to make such contracts, keeping within constitutional limitations and not offending public policy, as they please. They enter into contracts, as far as the law is concerned, advisedly. If the insured cannot bring himself within the terms of the policy he has accepted why should the court relieve him? To hold otherwise is to make a contract for parties which they never made themselves.[15] This the courts have no power to do. It is the exercise of such power that raises the cry against judicial legislation. Upon what principle can the courts revive a policy which by its terms was null and void?[16] We know of none.

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[11] *Languier v. White,* 29 La. Ann., 156; *Louber v. LeRoy,* 2 Sandf., 202.

[12] *Griswold v. Sawyer,* 56 Hun., 12; *Moran v. Prather,* 23 Wall., 492; *Thellusson v. Rendlesham,* 7 H. L. Cas., 429.

[13] *Trader's Ins. Co. v. Catlin, supra.*

[14] *Athens Mut. Ins. Co. v. Toney, supra.*

[15] *Imperial F. Ins. Co. v. Coos County, supra.*

[16] *Reynolds v. Ins. Co.,* 107 Md., 110; see *Bemis v. Ins. Co.,* 200 Pa., 340.

This is not a question of whether there has been a breach of the essence of the contract. It is a question of what the parties have said. It may be freely admitted that the rule contended for will in some cases work hardship. Nevertheless, in the sum total of cases greater justice will be done by holding the parties to the intendment of their statements than by applying a rule of so-called "natural justice." Such expeditions into the realm of moral obligation invariably end in confusion in the law and uncertainty in business affairs.[17] It is submitted that the holding of the principal case is correct.

ADEQUACY OF PROVOCATION IN HOMICIDE TO REDUCE THE CRIME FROM MURDER TO MANSLAUGHTER.

In the case of *The State v. Buonomo,*[1] the defendant, while with a party of drunken men and women in a brothel, shot and killed a woman. "The State introduced a confession of the accused in evidence, in which he stated that the woman whom he killed slapped him in the face just before the shooting, that he was drunk, and thought they wanted to kill him, and shot only to scare them." The trial court in its charge to the jury said: "As this case has been presented to you, no construction of the evidence open to you discloses either legal justification, or excuse; the only crime involved in your deliberations is that of murder. * * * You start, as I have said, with a killing which amounts to murder —that is, a killing characterized by malice aforethought, either express or implied."

On appeal by the defendant, Justice Thayer, in delivering the opinion of the court ordering a new trial, said: "The part of the confession tending to show that the shooting was accidental or done in hot blood upon reasonable provocation, presented matters which were clearly for the jury's consideration, if the claim had been made that the shooting was accidental or done under circumstances which extenuated the crime. * * * The court, by its charge, said in effect that it was not evidence, and withdrew it from the jury."

It may be that the court was right as to there being evidence of an accidental killing, but that a slap in the face at the hands of

[17] See *Vance on Insurance,* p. 433, and *Richards on Insurance,* p. 309.

[1] 87 Conn., 285.